IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DARRYL ASHMORE,

Plaintiff,

vs.

NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN,

Defendant.

Case No. 9:16-cv-81710-KAM

MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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INTRODUCTION

This is a claim for disability benefits brought by Darryl Ashmore against the NFL Player Disability & Neurocognitive Benefit Plan ("Plan"). The Plan is an ERISA-governed employee benefit plan that provides disability benefits to former NFL "Players." It was established by collective bargaining between the NFL and the NFL Players Association, and it is administered by a six-voting-member Disability Board ("Board") comprised of three NFL Club executives appointed by the NFL Management Council, and three former Players appointed by the NFL Players Association. The Board has full and absolute discretionary authority to administer the Plan and decide claims for benefits.

As authorized by the Plan, Players are referred for medical examinations with neutral physicians approved by both sides of the Board. The Plan expressly states that a Player will not be entitled to benefits if he fails to attend a scheduled examination without giving at least two days' advance notice of his inability to attend. This case turns on that failure-to-attend rule.

In October 2015, Ashmore applied for total and permanent disability ("T&P") benefits. The application that Ashmore filled out disclosed the Plan's neutral physician requirement, and Ashmore certified that he would follow the Plan's procedures and attend any examinations within 30 days. When Ashmore was referred for three neutral examinations (because his application implicated orthopedic, neurological, and neurocognitive impairments), he complained that he could not travel to them from his home in Boynton Beach, Florida.[1] To reduce the travel burden, Plan staff rescheduled the examinations and relocated them to Atlanta, Georgia, so that all three examinations could be completed in just one trip, over the course of three consecutive days.

[1] Ashmore did not deal with the Plan directly. His attorney, Mr. Dabdoub, communicated with Plan staff on his behalf.

Ashmore then objected to the rescheduled examinations. After rehashing his original complaints about his inability to travel, Ashmore said he would attend the examinations in Atlanta, but only on one condition: They all had to be rescheduled again because Ashmore speculated that he might not complete one of the three examinations. Ashmore also said he needed a plane seat with extra leg room, car service, and assistance carrying his luggage.

The drama over the Atlanta examinations unfolded just days before they were supposed to happen. With little time to lose, Plan staff tried to rearrange the examinations to address Ashmore's concerns, and when they could not they promptly informed Ashmore that (1) the examinations could not be rescheduled and would therefore go forward, and (2) the Plan's travel policy covered, and its travel agent would address, his latest seating, luggage, and transportation concerns.

Rather than make arrangements to attend the scheduled examinations in Atlanta, Ashmore asked that the matter be presented to the Plan's claims administrator, now insisting that he did not have to attend any examinations at the mere say-so of Plan staff. Plan staff presented Ashmore's application to the Disability Initial Claims Committee ("Committee"), the Plan's initial claims fiduciary, as Ashmore requested. While the application was pending before the Committee, the deadline for Ashmore to provide advance notice that he was unable attend the Atlanta examinations came and went; Ashmore did not attend the evaluations or notify the Plan that he could not attend them on the dates set; and so the Committee denied his application for failure to attend. Ashmore appealed the Committee's decision to the Board, which upheld the denial on the same failure-to-attend grounds.

In October 2016, Ashmore sued. According to Ashmore, the Board abused its discretion when it denied his application because he was always willing to attend the required neutral

examinations (he says he merely needed "accommodations") and, based on his correspondence with Plan staff, he believed the Plan would respond to his demands rather than deny his application outright.

This case is frustratingly simple. The NFL Players Association and the NFL Management Council created the Plan and its procedures through collective bargaining, and neutral evaluations are a key aspect of the disability process envisioned by the bargaining parties. Granted, the evaluations cannot always happen precisely when and where a Player might like, but they must happen. The Plan explicitly authorizes neutral evaluations, and Players who do not attend them are automatically ineligible for benefits. Every day, Players comply with the Plan's administrative procedures and things go smoothly. Ashmore was the rare exception.

Perhaps Ashmore did not like that the Plan requires neutral examinations, or maybe he did not like how Plan staff schedules them. Whatever the reason, Ashmore did everything he could to obstruct the process, first by claiming that he could not travel whatsoever, and then by inventing other obstacles to the examinations after conceding that he could travel to them. The tactic backfired when Ashmore was told that the three Atlanta examinations, which had already been rescheduled once at his request, could not and would not move again, and he did not provide advance notice that he was unable to attend those scheduled examinations. Having failed to give such notice, the Board correctly denied Ashmore's application under the terms of the Plan.

Ashmore will paint himself a victim of arbitrary and capricious decision-making, but the Court should not be fooled. Ashmore's objections—all premised upon his supposed travel limitations—were unjustified from the start. Ashmore has no problem traveling. He admitted as much when he conceded he would go to Atlanta, and his concerns about leg room, taxis, and

luggage handling fell within the Plan's ordinary travel policies and would have been addressed. (Ashmore would have known this had he bothered to consult the travel policy or contact the Plan's travel agent, as instructed.) But even if Ashmore had some limitations, he still had no legitimate reason to try to dictate the scheduling of three separate neutral evaluations under the theory that he might not be able to complete *one* of them. Finally, regardless of all else, Plan staff notified Ashmore that the examinations would go forward, as set, in Atlanta. At that point, a reasonable person in Ashmore's position would have attended the examinations, or at least tried to attend them. Ashmore did neither; he insisted that no one in the NFL Player Benefits Office could tell him what to do. If Ashmore is a victim, he is a victim of his own obstinacy and obstructionism.

With this lawsuit, Ashmore hopes to game the system and obtain benefits in circumvention of the Plan requirement that he submit to a scheduled examination with a neutral physician approved by both sides of the Board. That should not be allowed. The Plan faces a huge task in scheduling over 1,000 neutral examinations each year and issuing benefits determinations in compliance with strict deadlines mandated by the Department of Labor. That task will be impossible if the Board cannot follow the terms of the Plan and hold Players accountable for the commitments they make when applying for Plan benefits.

In the end, Ashmore's stated intentions, explanations, and expectations, such as they are, are irrelevant because it is indisputable that **Ashmore never notified Plan staff that he was unable to attend the Atlanta examinations**—in fact, nothing prevented him attending those examinations—and that is justification enough for the Board's decision. The Court should uphold the Board's decision and enter judgment in favor of the Plan.

BACKGROUND

I. The Plan And The Disability Board

The Plan was established and is maintained pursuant to collective bargaining between the NFL and the NFL Players Association.[2] It is an ERISA-governed employee welfare benefit plan that, among other things, provides T&P benefits to Players who are "substantially prevented from or substantially unable to engage in any occupation for remuneration or profit."[3]

Under the Plan's claims procedure, the Committee reviews initial applications for disability benefits.[4] Players have the right to appeal adverse Committee decisions to the Board.[5]

The Board is the Plan's administrator and its named fiduciary within the meaning of sections 3(16)(A) and 402(a)(2) of ERISA, respectively.[6] The Board is "responsible for implementing and administering the Plan, subject to the terms of the Plan,"[7] and it has "full and absolute discretion, authority, and power to interpret, control, implement, and manage" the Plan,[8] including the authority to "[a]dopt procedures, rules, and forms for the administration of the

[2] Plan Doc. at 1 (006). Cites like "006" refer to bates-numbered pages in the Administrative Record submitted with this motion.

[3] Plan Doc. at 1 (006); *id*. § 3.2(a) (011).

[4] Plan Doc. § 9.2(c) (040); *id*. § 9.5 (042).

[5] *See* Plan Doc. § 13.14 (052) (outlining administrative claims procedure).

[6] Plan Doc. § 1.2 (007); *id*. § 9.2 (039).

[7] Plan Doc. § 9.2 (039).

[8] Plan Doc. § 9.2 (039). *See also id*. § 9.9 (044) ("Benefits under this Plan will be paid only if the Disability Initial Claims Committee, or the Disability Board, or a designee of either, decides in its discretion that the applicant is entitled to them. In exercising their discretionary powers under the Plan and Trust, the Disability Board and the Disability Initial Claims Committee will have the broadest discretion permissible under ERISA and any other applicable laws, and their decisions will be binding upon all persons affected thereby. In deciding claims for benefits under this Plan, the Disability Board and Disability Initial Claims Committee will consider all information in the Player's administrative record, and shall have full and absolute discretion to determine the relative weight to give such information.").

Plan."[9] It also has ultimate, discretionary authority to "[d]ecide claims for benefits."[10]

The Board, like any ERISA fiduciary, must "discharge [its] duties with respect to the Plan solely and exclusively in the interest of Players."[11] The Board's structure and the Plan's structure ensure impartiality, as every court to consider the issue has found.[12] Pursuant to the Taft-Hartley Act, 29 U.S.C. section 186(c)(5)(B), the Board is composed of both employer and employee representatives.[13] It has six voting members.[14] Three are just like Ashmore: They are former players appointed to the Disability Board by the NFL Players Association (the bargaining party representing Players). The other three voting members of the Board are NFL Club executives appointed by the NFL Management Council (the bargaining party representing NFL Clubs).[15] All Board members serve voluntarily, without pay. They have no financial interest in the outcome of any particular application for T&P benefits.

II. Plan Neutral Evaluations

Section 3.2(c) of the Plan provides that any Player applying for T&P benefits may be referred for an examination with a Plan "neutral physician":

> Whenever the Disability Board or the Disability Initial Claims Committee reviews the application or appeal of any Player for T&P benefits under either subsection

[9] Plan Doc. § 9.2(e) (040).

[10] Plan Doc. § 9.2(c) (040).

[11] Plan Doc. § 9.8 (043).

[12] *See Boyd v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 796 F. Supp. 2d 682, 690-91 (D. Md. 2011) (noting that every district court in Maryland to address the issue has found no conflict on the part of the Board); *Johnson v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 468 F.3d 1082, 1086 (8th Cir. 2006) ("[T]here is no conflict of interest."); *Courson v. Bert Bell NFL Player Ret. Plan*, 75 F. Supp. 2d 424, 431 (W.D. Pa. 1999) ("[W]e find that there is no conflict of interest which requires special attention or a more stringent standard of review under *Firestone*.").

[13] Plan Doc. at 1 (006); Plan Doc. § 1.2 (007).

[14] Plan Doc. § 9.1 (039).

[15] Plan Doc. § 9.1(a)-(b) (039).

> (a) or subsection (b) above, such Player may first be required to submit to an examination by a neutral physician or physicians, or institution or institutions, or other medical professional or professionals, selected by the Disability Board or the Disability Initial Claims Committee and may be required to submit to such further examinations as, in the opinion of the Disability Board or the Disability Initial Claims Committee, are necessary to make an adequate determination respecting his physical or mental condition. Any person refusing to submit to any examination will not be entitled to any T&P benefits under this Article. **If a Player fails to attend a scheduled examination, his application for T&P benefits will be denied, unless the Player provided at least two business days advance notice to the Plan Office that he was unable to attend.** The Disability Board or the Disability Initial Claims Committee, as applicable, may waive the rule in the prior sentence if circumstances beyond the Player's control preclude the Player's attendance at the examination.[16]

The Board maintains the neutral-physician network,[17] but staff within the NFL Player Benefits Office (also called the "Plan Office") schedule the evaluations. Scheduling is driven primarily by the availability of the Plan neutral physicians and their proximity to the Player. Another important consideration is timing. Whenever a Player applies for benefits, he certifies that he will attend any required neutral examinations within 30 days.[18] Time is essential because, under the terms of the Plan and Department of Labor regulations, the Committee generally must decide every initial application for disability benefits within 45 days of submission.[19] The Plan pays for the neutral examinations and all reasonable travel expenses.[20]

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[16] Plan Doc. § 3.2(c) (012) (emphasis added).

[17] Plan Doc. § 12.3 (049). The bargaining parties have since amended the Plan to give the bargaining parties the ability to appoint Plan neutral physicians.

[18] *See, e.g.*, 10/7/2015 Application at 1 (073).

[19] Plan Doc. § 13.14 (053) ("If a claim for disability benefits is wholly or partially denied, the Disability Initial Claims Committee will give the claimant notice of its adverse determination within a reasonable time, but not later than 45 days after receipt of the claim."). *See also* Dept. of Labor Claims Procedure, 29 C.F.R. § 2560.503-1(f)(3) ("In the case of a claim for disability benefits, the plan administrator shall notify the claimant… of the plan's adverse benefit determination within a reasonable period of time, but not later than 45 days after receipt of the claim by the plan.").

[20] *See* 10/9/2015 Ltr. fr. E. Richard to D. Ashmore at 2 (085) (referring to the travel policy distributed to all Players referred for Plan neutral evaluations).

III. Ashmore's Application For Benefits

Ashmore applied for T&P benefits on October 7, 2015.[21] The first page of the application that Ashmore submitted contained the following disclosure and certification by Ashmore:

> I understand that I may be required to undergo a comprehensive evaluation, and I certify that I will be able to attend such evaluation within 30 days from the date this Application is received by the Plan Office. I understand that failure to attend without 2 business days notice, and cooperate with such evaluation, will result in my Application being denied.[22]

At the end of the application, Ashmore acknowledged once more that he "may be required to attend a physical examination with one or more physicians or other health professionals;" "that failure to attend may cause [his] application to be denied;" and that he would "comply with the Plan's procedures in connection with [his] claim for disability benefits."[23]

On October 9, Plan staff scheduled three neutral evaluations for Ashmore: one on October 16, 2015 (in San Antonio, TX); another on October 20, 2015 (in North Palm Beach, FL); and a third on October 22, 2015 (in Tampa, FL).[24] Ashmore was referred for examinations in three separate cities due to Plan neutral availability.[25]

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[21] *See generally* 10/7/2015 Application (073).

[22] 10/7/2015 Application at 1 (073).

[23] 10/7/2015 Application at 4 (076). Ashmore was familiar with the Plan's neutral process even without these disclosures in the T&P application. When Ashmore applied for T&P benefits, he was already receiving the Plan's partial disability benefit, called the "line-of-duty" benefit, and he had been through the neutral process in conjunction with that application. *See* 10/29/2015 E-Ballot Cover Sheet (343) (noting that Ashmore was approved for line-of-duty, or "LOD," benefits effective April 1, 2010, based upon the report of Plan neutral orthopedist Dr. Canizares); undated Physician's Report Form and 3/26/2010 Narrative Report from Dr. Canizares, Plan neutral orthopedist (482); 3/25/2010 Physician's Report Form and 3/25/2010 Narrative Report from Dr. DiDio, Plan neutral neurologist (491).

[24] 10/9/2015 Ltrs. fr. E. Richard to D. Ashmore (084- 089).

[25] *See* 10/29/2015 E-mail fr. P. Scott to A. Williams, *et al*. (349) ("[H]e was initially scheduled for appointments in 3 separate cities due to doctor availability….").

On October 13, Ashmore's attorney, Mr. Dabdoub, objected to the timing and location of all three neutral examinations.[26] According to Mr. Dabdoub, the biggest issue was that the examinations would require trips to "three different cities (one in another state entirely) all within a span of seven (7) days," and there was "concern… that Mr. Ashmore's medical condition w[ould] be exacerbated by long distance travel."[27] Mr. Dabdoub represented that Ashmore's "medical restrictions and limitations" precluded travel to anywhere beyond a 45 minute drive from Ashmore's home in Boynton Beach.[28] The next day, Mr. Dabdoub produced an unsigned letter from Dr. Frank Conidi, a neurologist, stating that Ashmore's "chronic back issues and radicular symptoms preclude[d] him from flying, especially long flights over an hour."[29] Dr. Conidi recommended that Ashmore "be evaluated by physicians based out of Florida, preferably within a one hour drive of his home."[30]

On October 16, Plan staff notified Ashmore and Mr. Dabdoub that all three examinations would be rescheduled for November 2-4, 2015, and relocated to Atlanta, Georgia.[31] Atlanta was not within a 45-minute or one-hour drive of Ashmore's home, but it was then the closest location to Ashmore that had Plan neutral physicians in the three medical specialties required, thus allowing the examinations to be completed with just one relatively short trip.[32]

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[26] 10/13/2015 Ltr. fr. E. Dabdoub to E. Richard (091).

[27] 10/13/2015 Ltr. fr. E. Dabdoub to E. Richard at 1 (091).

[28] 10/13/2015 Ltr. fr. E. Dabdoub to E. Richard at 1 (091).

[29] 10/15/2015 Ltr. fr. Dr. Conidi to "whom it may concern" (101).

[30] 10/15/2015 Ltr. fr. Dr. Conidi to "whom it may concern" (101).

[31] 10/16/2015 Ltrs. Fr. E. Richard to D. Ashmore (103- 108); 10/16/2015 E-mails fr. E. Richard to D. Ashmore, E. Dabdoub (401- 406).

[32] *See* 10/29/2015 E-mail fr. P. Scott to A. Williams, *et al*. (349) (noting Plan staff "tried to accommodate [Ashmore] at his request by scheduling all 3 of his appointments in Atlanta requiring only 1 trip").

Ten days passed until Mr. Dabdoub wrote again, on October 27, 2015, to object to the rescheduled examinations. Mr. Dabdoub "reiterate[d] that Mr. Ashmore [wa]s incapable of traveling long distances,"[33] but then conceded that Ashmore would attend examinations in Atlanta if they were rescheduled, once more, to require *multiple* trips to Atlanta:

> We are asking that Mr. Ashmore's three examinations be broken-up into two separate trips to Atlanta. One trip would be for the neuropsychological evaluation and the other trip for the other two examinations. As for the neuropsychological evaluation, it is currently scheduled to take place from 8:30 AM to 4:30 PM, but Mr. Ashmore cannot sit for protracted periods of time. Therefore, this examination should be scheduled to take place over a period of two or three days.[34]

Mr. Dabdoub also said that Ashmore would need extra leg room on the plane, car service to and from the airport, and assistance carrying his luggage.[35]

On October 28, Plan staff informed Mr. Dabdoub that the Atlanta examinations could not be rescheduled and would therefore go forward on November 2, 3, and 4:

> [Plan staff] reached out to the doctor to see if he can accommodate the request to break up the neuropsych testing into two days, and due to his full schedule he is unable to do that. Thus all three evaluations are still scheduled for 11/2, 11/3, and 11/4 in Atlanta. As far as travel is concerned you have a copy of the travel policy and Mr. Ashmore can make travel accommodations with Art at the Travel Store regarding seats and a car service. Please let me know if you have questions.[36]

After receiving confirmation that the examinations would not be rescheduled, Mr. Dabdoub submitted his final remarks on October 28. He wrote that "[i]t's not good enough to say you have to go [to the neutral examinations] because we said so," and "I would like to hear

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[33] 10/27/2015 Ltr. fr. E. Dabdoub to E. Richard at 1 (110).

[34] 10/27/2015 Ltr. fr. E. Dabdoub to E. Richard at 1 (110).

[35] 10/27/2015 Ltr. fr. E. Dabdoub to E. Richard at 1-2 (110- 11).

[36] 10/28/2015 E-Mail fr. E. Richard to E. Dabdoub (410). *See also* 10/29/2015 E-mail fr. P. Scott to A. Williams, *et al*. (349) ("As requested in [Mr. Dabdoub's] letter, we attempted to get our neuro-psychologist to adjust his schedule to accommodate multiple testing days, and they were unable to adjust.").

from the Committee or whoever has authority about accommodations for Ashmore."[37]

The first of the three scheduled examinations in Atlanta was set for Monday, November 2, 2015. Therefore, under Plan Section 3.2(c), the deadline for Ashmore to provide advance notice of his inability to attend the examinations fell on Thursday, October 29, 2015. At 4:50 pm that day, the Plan's Director of Disability Benefits, Paul Scott, presented Ashmore's application to the Committee, explaining as follows:

> [Ashmore's] attorney has submitted letters complaining about our evaluation process. We… initially scheduled for appointments in 3 separate cities due to doctor availability, but we tried to accommodate him at his request by scheduling all 3 of his appointments in Atlanta requiring only 1 trip… and that is still not satisfactory. As requested in his letter, we attempted to get our neuro-psychologist to adjust his schedule to accommodate multiple testing days, and they were unable to adjust.[38]

On November 2—having heard nothing more from Ashmore—the member of the Committee appointed by the NFL Players Association (Chris Smith) voted to deny Ashmore's application for "failure to comply" with the Plan's neutral evaluation procedures.[39] A short time later, the Committee member appointed by the NFL Management Council (Patrick Reynolds) did the same.[40] On November 3, 2015, Plan staff sent Ashmore a letter explaining the Committee's decision.[41]

In a letter dated April 29, 2016, Mr. Dabdoub appealed the Committee's decision to the Board. Mr. Dabdoub argued that the Committee's decision was arbitrary and capricious in part because "Ashmore was more than willing to submit to the required physical examinations;" he

[37] 10/28/2015 E-Mail fr. E. Dabdoub to E. Richard (409).

[38] 10/29/2015 E-mail fr. P. Scott to A. Williams, *et al*. (349).

[39] 11/2/2015 E-Mail fr. C. Smith to S. Vincent, *et al*. (352- 54).

[40] 11/2/2015 E-Mail fr. P. Reynolds to C. Smith, *et al*. (356).

[41] 11/3/2015 Ltr. fr. E. Richard to D. Ashmore (369- 70).

merely sought "appropriate travel accommodations;" and he was "under the impression that the NFL [sic] was actively engaging us on the requests for accommodations."[42]

The Board considered Ashmore's appeal at its regularly-scheduled quarterly meeting on August 17, 2016. The decision was unanimous. All six voting members of the Disability Board—including the three former Players appointed by the NFL Players Association—upheld the Committee's denial. The letter explaining the Disability Board's decision stated, in relevant part:

> At its August 17, 2016 meeting, the Disability Board reviewed your appeal and unanimously determined that your failure to attend three scheduled medical examinations, without providing at least two business days advance notice to the NFL Player Benefits Office, renders you ineligible for T&P benefits under Plan Section 3.2(c). The Disability Board considered Mr. Dabdoub's explanation for your failure to attend, but it found no evidence of your attempt to provide at least two business days advance notice of your inability to attend the previously scheduled examinations. The Disability Board also found that your explanation does not constitute the type of circumstances beyond your control that would allow the Disability Board to waive the failure-to-attend rule stated in Section 3.2(c).

IV. The Litigation

Ashmore filed suit on October 11, 2016. His complaint raises the same arguments rejected by the Board during the administrative phase. He claims it was wrong to deny his application, mainly because he was always willing to attend the neutral examinations, albeit with conditions.[43]

[42] 4/29/2016 Ltr. fr. E. Dabdoub to NFL Player Benefits at 3 (374).

[43] *See, e.g.*, Compl. ¶ 12 (alleging that Ashmore "has no objection to submitting to examinations"); *id*. ¶ 15 (stating that "Ashmore is agreeable to undergoing examinations"); *id*. ¶ 18 (noting that Ashmore would attend examinations, with certain accommodations); *id*. ¶ 33 ("Ashmore was agreeable to attending the examinations").

STANDARD OF REVIEW

The Eleventh Circuit has a six-step framework for reviewing a plan administrator's decision:

> (1) Apply the *de novo* standard to determine whether the claim administrator's benefits-denial decision is "wrong" (i.e., the court disagrees with the administrator's decision); if it is not, then end the inquiry and affirm the decision.
>
> (2) If the administrator's decision in fact is "*de novo* wrong," then determine whether he was vested with discretion in reviewing claims; if not, end judicial inquiry and reverse the decision.
>
> (3) If the administrator's decision is "*de novo* wrong" and he was vested with discretion in reviewing claims, then determine whether "reasonable" grounds supported it (hence, review his decision under the more deferential arbitrary and capricious standard).
>
> (4) If no reasonable grounds exist, then end the inquiry and reverse the administrator's decision; if reasonable grounds do exist, then determine if he operated under a conflict of interest.
>
> (5) If there is no conflict, then end the inquiry and affirm the decision.
>
> (6) If there is a conflict, the conflict should merely be a factor for the court to take into account when determining whether an administrator's decision was arbitrary and capricious.[44]

In this case, the Court need only address whether the Board's decision was *de novo* wrong and, if it was, whether the decision was nonetheless reasonable. The Board has discretionary authority. It does not have a conflict of interest.

[44] *Blankenship v. Metro. Life Ins. Co.*, 644 F.3d 1350, 1355 (11th Cir. 2011).

ARGUMENT & AUTHORITIES

I. The Board Was Right To Deny Ashmore's Application Under The Plan's Failure-To-Attend Provision.

The first question for this Court is whether the Board's decision was wrong. If it was not wrong, the Court should "end the inquiry and affirm the [Board's] decision."[45] The Court need go no farther than this first question.

A. Ashmore did not give two days' prior notice that he was unable to attend the Atlanta examinations.

The Board's decision was not wrong; it was absolutely correct. In fact, the Board had little choice but to deny the application under the Plan's failure-to-attend provision, Section 3.2(c). That provision states that "[i]f a Player fails to attend a scheduled examination, his application for T&P benefits ***will be denied***, unless the Player provided at least two business days advance notice to the Plan Office that he was unable to attend" the examination.[46] On October 28, 2015, Plan staff advised Ashmore that his examinations remained scheduled for November 2, 3, and 4 in Atlanta, Georgia.[47] Ashmore therefore had until October 29th—two business days prior to the first scheduled examination—to notify the Plan Office that he was unable to attend. Ashmore never did so, and therefore Section 3.2(c) compelled the Board to deny his application. Under ERISA, the Board has a duty to administer claims "in accordance with the documents and instruments governing the plan."[48] The Supreme Court has "recognized the particular

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[45] *Blankenship*, 644 F.3d at 1355.

[46] Plan Doc. § 3.2(c) (012) (emphasis added).

[47] 10/28/2015 E-Mail fr. E. Richard to E. Dabdoub (410).

[48] 29 U.S.C. § 1104(a)(1)(D). *See Heimeshoff v. Hartford Life & Acc. Ins. Co.*, -- U.S. --, 134 S. Ct. 604, 612 (2013) ("And once a plan is established, the administrator's duty is to see that the plan is 'maintained pursuant to [that] written instrument.' This focus on the written terms of the plan is the linchpin of 'a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'") (citations omitted).

importance of enforcing plan terms as written in § 502(a)(1)(B) claims" like this one.[49]

Ashmore's arguments about communicating with Plan staff, his supposed willingness to attend the examinations, and his belief that something else might happen with his application are both dubious and immaterial. It is indisputable that Ashmore never notified the NFL Player Benefits Office that he was ***unable*** to attend the examinations on November 2, 3, and 4 in Atlanta.

B. Ashmore cannot credibly contend that he was unable to attend the Atlanta examinations.

Ashmore cannot argue that he was unable to attend the Atlanta examinations because nothing in the record remotely supports that notion. In all of the back-and-forth with Plan staff, Mr. Dabdoub never hinted at any conflict that would prevent Ashmore from going to Atlanta on November 2, 3, or 4. Mr. Dabdoub initially objected to all travel due to Ashmore's supposed travel limitations, but those objections quickly dissolved when Mr. Dabdoub conceded that Ashmore was fully capable of traveling to Atlanta (more than once, if necessary).[50] Shifting gears, Mr. Dabdoub then insisted that all of the Atlanta examinations should be rescheduled based on speculation that Ashmore might not be able to sit still for an entire day of neuropsychological testing.[51] However, the neuropsychological testing was just one of three required evaluations. Common sense dictates that nothing prevented Ashmore from attending and at least attempting to complete that neuropsychological evaluation, just like nothing prevented Ashmore from attending and completing the other two evaluations. Issues with the plane seat, car service, and luggage plainly did not prevent Ashmore from attend the

[49] *Id.*, 134 S. Ct. at 612.

[50] 10/27/2015 Ltr. fr. E. Dabdoub to E. Richard at 1 (110).

[51] 10/27/2015 Ltr. fr. E. Dabdoub to E. Richard at 1 (110).

examinations.[52] These things would have been addressed by the Plan's travel agent, whom Ashmore never contacted, and the Plan's travel policy, which Ashmore never consulted.

In reality, Ashmore could have attended the Atlanta examinations; he simply refused to do so. Ashmore goes to great lengths to avoid that characterization, however, because the Plan states that "[a]ny person refusing to submit to any examination will not be entitled to any T&P benefits."[53] By couching his behavior as something other than an outright refusal to attend, Ashmore believes (incorrectly) that he can show the Board abused its discretion. Even if Ashmore did not technically "refuse" to attend the examinations, he still failed to give advance notice that he was unable to attend them, and he was ineligible for benefits for this reason alone.

II. The Board Did Not Abuse Its Discretion When It Did Not Reschedule The Atlanta Examinations.

To the extent Ashmore claims that the Board abused its discretion because it did not rearrange and reschedule the neutral evaluations on demand, this claim must fail as well. The Board has discretionary authority to administer the Plan. Therefore, the question for the Court is whether it was reasonable, at all, for the Board to deny Ashmore's application rather than accede to his scheduling demands.[54]

It was perfectly reasonable for the Board to reject Ashmore's demands because his conduct demonstrated that he was more intent on erecting every conceivable barrier to the process than attending the required examinations. First, when Ashmore applied for T&P benefits, he certified that he would comply with Plan procedures and attend any required Plan neutral evaluations within 30 days. The examinations rescheduled for November 2, 3, and 4 in

[52] 10/27/2015 Ltr. fr. E. Dabdoub to E. Richard at 2 (111).

[53] Plan Doc. § 3.2(c) (012).

[54] *Blankenship*, 644 F.3d at 1355.

Atlanta fell at the very end of this 30-day window. Thus, Ashmore's continued objections and rescheduling requests meant that he failed to live up to his 30-day commitment, and it prevented the Committee from deciding his application within 45 days, as required under the terms of the Plan and U.S. Department of Labor claim regulations.[55] Second, Plan staff had already rescheduled all three examinations once, at Ashmore's request, and doing so only inspired Ashmore to concoct new reasons for why he could not attend the required neutral evaluations on the dates and at the locations selected. Third, Ashmore's demand that *all three* examinations be rescheduled yet again was based on utter speculation about whether he might be able to complete *one* of them. The explanation did not justify scuttling one examination, much less all three of them, and it flatly contradicted Ashmore's original claim that he was completely unable to travel. Fourth, Ashmore's protestations about a plane seat, car service, and luggage—all trivial issues covered by the Plan's travel policy—revealed that Ashmore had never even attempted to arrange his travel to Atlanta.

This case exemplifies why the bargaining parties created the neutral examination rules and procedures. Every year, the Plan processes hundreds of disability applications, which in turn requires the coordination of two- to three-times as many neutral examinations with multiple physicians' offices across the country. All of this must be accomplished under strict time constraints imposed by the Plan and the U.S. Department of Labor. To facilitate the process, Plan staff arranges the neutral examinations, and they accommodate Player's scheduling and travel-related requests when they can. But allowing Players like Ashmore to dictate when,

[55] Plan Doc. § 13.14 (053) ("If a claim for disability benefits is wholly or partially denied, the Disability Initial Claims Committee will give the claimant notice of its adverse determination within a reasonable time, but not later than 45 days after receipt of the claim."). *See also* Dept. of Labor Claims Procedure, 29 C.F.R. § 2560.503-1(f)(3) ("In the case of a claim for disability benefits, the plan administrator shall notify the claimant… of the plan's adverse benefit determination within a reasonable period of time, but not later than 45 days after receipt of the claim by the plan.").

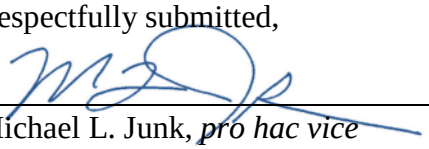
where, and how neutral examinations should be conducted—based on made-up complaints and illogical demands—is incompatible with the orderly and efficient administration of the Plan.

CONCLUSION

The Board correctly denied Ashmore's application for T&P benefits in light of his failure to attend several Plan neutral evaluations, and it reasonably declined to reschedule the examinations once more at Ashmore's request. The Court should grant this motion and enter judgment in favor of the Plan.

Dated: October 30, 2017

Respectfully submitted,



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